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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kansas Supreme Court (R. 28-32) has not yet been officially reported. It is unofficially reported at 207 P. 2d 425.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered June 11, 1949 (R. 28-32), and a motion for rehearing filed July 1, 1949 (R. 32-36), was denied July 8, 1949 (R. 36). The petition for a writ of certiorari was filed October 6,

1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See also 28 U.S.C. 2101(c).

QUESTION PRESENTED

Whether an alien who is unwilling because of religious scruples to contribute "anything to be used solely and directly in furtherance of armed conflict" or to wear the uniform of the armed forces in any capacity may be admitted to citizenship.

STATUTE INVOLVED

The pertinent provisions of the Nationality Act of 1940, 54 Stat. 1137, are as follows:

> Sec. 307. (a) (8 U.S.C. 707(a)). No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.
>
> Sec. 335 (8 U.S.C. 735)(a). A person who has petitioned for naturalization shall, before

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being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, * * *.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature.

STATEMENT

Petitioner, a teacher at Sterling College, Sterling, Kansas, was born in Germany in 1917, entered the United States in 1937, and has since resided in this country (R. 4-5, 9-11, 12). He married an

American citizen in 1943 and at the time of the hearing in November 1947 (R. 6) they had two children (R. 11, 12, 17). He was classified IV-E as a conscientious objector under the Selective Service Act of 1940 and, with his draft board's approval, engaged in agricultural activities, including teaching (R. 10-11, 17, 25). In May 1947, he filed a petition for naturalization in the District Court of Barton County, Kansas (R. 4-5). On examination before a naturalization examiner in October 1947, petitioner made the following verified statement (R. 23-25; see also R. 13-17):

> Q. On April 9, 1947, at Hutchinson, Kansas, you testified before me and you stated that you believed the existence of Armed Service is not necessary in a Christian nation. Is that correct?
>
> A. Yes.
>
> Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?
>
> A. Yes.
>
> Q. Are you an ordained minister?
>
> A. No. I am a member of the Society of Friends which has no ordained ministers.
>
> Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: "Any relief of suffering or any effort of a constructive nature which did not require entering the

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Armed Forces." Will you explain in more detail what you mean by that answer?

A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs.

Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever?

A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict.

Q. In time of war would you be willing to render any and all services for which you may be physically able to render in furtherance of the war effort of the United States which would not necessitate the wearing of the uniform of one of the armed forces and which would not necessitate the bearing of arms?

A. Only as qualified in my answer to the question next above.

Q. Did it meet with your approval for the United States to send arms and ammunitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?

A. It did not. I was opposed to that.

Q. Are you glad Germany was defeated in the recent war?

A. I was opposed to Nazism in Germany from its inception and I would be pleased if Germany were freed from it but I do not be-

lieve it has been nor has it been benefited directly in any way by the war. I also believe the United States has lowered its resistance to Nazi influence because of having expended its energies in an attempt to resist Nazism by armed force.

Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?

A. No.

Q. What, if anything, did you do or try to do in furthering the war effort of the United States during the recent war?

A. Whatever I did would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort. My work was teaching agriculture, testing butter fat and working in UNRRA which work was at all times of national importance and acceptable to my draft board.

Q. In the event it should be permissible in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?

A. Yes.

Q. In the event it should be permissible in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?

A. No.

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Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?

A. No.

Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?

A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces.

Q. If you were a minister could you wear the uniform as a chaplain?

A. No. Because chaplains are members of the armed services.

On the basis of these statements, the examiner found that petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (R. 5). On petitioner's demand, a hearing was held before the court in November 1947 (R. 6), at which petitioner and his witnesses testified, the examiner filed a recommendation that the petition be denied, and petitioner's statement quoted above was acknowledged by him and introduced in evidence (R. 9-25).

In February 1948, the court entered a decision finding "that under the authority of *Girouard* v.

United States, 328 U. S. 61, * * * said Petitioner should be admitted to citizenship of the United States * * *" (R. 6). Later, in June 1948, after petitioner had filed a motion for judgment in accordance with the court's findings and conclusions, the court entered an order denying the petition for naturalization. A motion for a new trial was argued and denied on August 18, 1948. (R. 7.) On appeal to the Kansas Supreme Court, the judgment was affirmed (R. 28-32).

ARGUMENT

In *Girouard* v. *United States,* 328 U. S. 61, upon which petitioner relies, this Court reexamined the rule of the earlier *Schwimmer* (279 U. S. 644), *Macintosh* (283 U. S. 605), and *Bland* (283 U. S. 636) cases "that an alien who refuses to bear arms will not be admitted to citizenship" (328 U. S. at 63), and concluded that those cases "do not state the correct rule of law" (*id.,* at 69). However, the Court was there concerned with an applicant for citizenship who was conscientiously opposed on religious grounds to bearing arms, but who was willing, if called for service under the Selective Training and Service Act of 1940, to perform non-combatant service in the armed forces. And the Court held, as a matter of statutory construction (see *id.,* at 63), that such a person is qualified to take the naturalization oath (*supra,* p. 3). The Court found support for this holding in the dissenting views expressed in the *Schwimmer* and *Macintosh*

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cases, in the provisions of the Selective Training and Service Act of 1940 and earlier draft laws for the induction of religious objectors for non-combatant service (328 U. S. at 66-67), and in the relaxed requirements for naturalization enacted in 1942 for the benefit of aliens who served in our armed forces in World War II, whether as combatants or non-combatants (*id.*, at 67-68). It is thus clear from the *Girouard* decision that a refusal on religious grounds *to bear arms* in defense of the country does not of itself disqualify an alien seeking citizenship. But it does not follow from this abrogation of the requirement of willingness to bear arms that aliens who, like petitioner here, are unwilling to perform *any* service in furtherance of a war effort of the United States are qualified to take the naturalization oath. The court below construed the *Girouard* case as holding that "an alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant, but who because of religious scruples is unwilling to bear arms in defense of this country, may be admitted to citizenship" (R. 31), but it declined to extend the rule of that case to one like petitioner who is "not willing to serve in the army as a non-combatant" (R. 32).

We agree that petitioner has failed to meet the minimum requirements for citizenship as interpreted in the *Girouard* case. In upholding Girouard's claim that he was qualified to take the naturalization oath despite his unwillingness to participate in the war effort as a combatant, the

Court observed that, in modern total war, essential contributions to the war effort are made by those whose religious scruples prevent them from bearing arms. It said (328 U. S. at 64):

> The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. * * *. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. * * * One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among noncombatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory.

But unlike Girouard and others such as those mentioned in the quotation, petitioner is not willing to work in a munitions factory in time of war, deliver ammunition to men at the front, or "contribute anything to be used solely and directly in furtherance of armed conflict", either in a combatant or a non-combatant capacity. We submit, therefore, that he is not willing to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic," as the statutory oath requires.

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Petitioner argues, however, that in the *Girouard* case the Court did not distinguish between persons willing to serve in the armed forces as non-combatants and those who are unwilling to contribute to a war effort in any capacity. But the facts of that case and the tenor of the majority opinion negate this contention. The Court held only that the naturalization oath does not exact a willingness to bear arms and to that extent it disapproved the earlier decisions. While, undoubtedly, the effect of the decision was to overrule the decision in the *Bland* case, which the Court thought was "indistinguishable" (328 U. S. at 63),[1] it is significant that the Court did not overrule the decisions in the *Macintosh* and *Schwimmer* cases, which were distinguishable on their facts (*ibid.*), but only reversed the *rule* of those cases and *Bland* that willingness to bear arms is a prerequisite to naturalization (*id.*, at 63-64, 69).

The fact that in the Selective Service Acts of 1940 and 1948, Congress made specific exemptions from combatant and non-combatant service for those unwilling to serve in either capacity because of religious scruples does not, as petitioner asserts (Pet. 8-9), manifest a congressional intent as to the proper interpretation of the naturalization oath. It merely indicates a desire by Congress to accom-

[1] Bland, like Girouard, was opposed only to bearing arms. She had spent nine months in the service of the United States in France nursing our soldiers and was willing to defend the country "as far as my conscience as a Christian will allow" (283 U. S. 636, 637).

modate the military needs of the nation and the religious scruples of those who are conscientiously opposed to war.

The best evidence of Congress' intent as to the eligibility of a conscientious objector to combatant and non-combatant service to take the naturalization oath is found in the Act of May 26, 1926, c. 398, §§ 1, 7, 44 Stat. 654, which made provision for the more expeditious naturalization of alien veterans of World War I, and the acts of March 27, 1942, c. 199, § 1001, 56 Stat. 176, 182 (8 U.S.C. 1001, 1004), and December 7, 1942, c. 690, 56 Stat. 1041 (8 U.S.C. 723a), both of which were additions to the Nationality Act of 1940 and grant special privileges in respect of naturalization to alien veterans of both world wars, the Spanish-American War, and the Mexican Border campaign. All of these statutes contain an identical proviso excluding from their benefits any "conscientious objector who performed no military duty whatever or refused to wear the uniform." As we have pointed out, the Court in the *Girouard* case found support for its construction of the naturalization oath prescribed by the Nationality Act as not requiring a willingness to bear arms in the fact that, without making any change in the oath, Congress extended the benefits of the 1942 statutes to alien veterans who, because of religious scruples, were unwilling to bear arms but were willing to and did serve in the armed forces as non-combatants (328 U. S. at 67-68, 70). By the same token, the proviso against com-

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plete conscientious objectors contained in all three of the statutes cited above, and especially those passed in 1942, subsequent to the Nationality Act of 1940, is cogent evidence that Congress deemed the oath prescribed by that statute to require, at the least, a willingness to contribute some non-combatant service in aid of the defense of the country in time of war. Petitioner's attitude does not satisfy this requirement.

CONCLUSION

The decision below is in accord with the applicable decisions of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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NOVEMBER 1949.

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